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No.

In the

Supreme Court of the United States

SALIM OLEOCHEMICALS,

Petitioner,

v.

M/V SHROPSHIRE, her engines, boilers, tackle, etc., BIBBY INTERNATIONAL SERVICES (IOM) LTD., LANGTON SHIPPING LTD, BOTANY BAY PARCEL TANKERS INTERNATIONAL, BOTANY BAY MANAGEMENT SERVICES PTY LTD., and LANGTON SHIPPING,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED FOR REVIEW

This is an Admiralty case which addresses whether a foreign arbitration clause in a maritime bill of lading is invalid or is encompassed under the general maritime law and the U.S. Carriage of Goods by Sea Act, 46 U.S.C. App. 1300, et seq. (COGSA). The federal courts are in conflict with respect to the applicability of COGSA and the separation of in rem and in personam claims. The Petitioner seeks that this Honorable Court resolve the conflicts so that there may be uniformity and that cargo owners are not forced to litigate an action in foreign countries where their may be no jurisdiction and that liability may be hampered.

London arbitrators have no jurisdiction to adjudicate in rem claims, and English law does not even recognize a maritime lien against the vessel in rem for cargo damage. Lack of in rem jurisdiction in London arbitration relieves the ship of liability in contravention of COGSA 1303(8). Thus, lack of a remedy for the Petitioner's in rem claim in London arbitration should have precluded the District Court and the Second Circuit Court of Appeals from dismissing the in rem claim from within its jurisdiction.

Therefore, the Petitioner requests that this Honorable Court grant this Writ for Certiorari and address the salient issues of:

1. Whether the lower courts improperly relinquished its admiralty jurisdiction by the dismissal of the timely filed in rem action that deprived the Petitioner of a remedy for its in rem rights against the vessel and in personam rights against the managers.

2. Whether the lack of jurisdiction over in rem claims in London arbitration relieves the ship of liability in contravention of COGSA §1303(8)?

3. Whether the lower courts erred by dismissing the in personam claims against the vessel managers sued herein for their own negligence, not on the bill of lading, and thus are not subject to the London arbitration clause of the COA?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit dated July 9, 2002, is set forth in the Appendix, p. 1a. (2002 U.S. App. LEXIS 14124). The opinion of the United States District Court for the Southern District of New York dated May 1, 2001, is set forth in the Appendix.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Second Circuit issued its Decision in this case on July 9, 2002. This Petition was timely filed.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

Statutory

43 U.S.C. 1303(8) – Carriage of Goods by Sea Act:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void

and of no effect.

9 U.S.C. 2 - Federal Arbitration Act:

> A written provision in any maritime transaction...to settle by arbitration a controversy thereafter arising out of such contract...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

Procedural History

On April 29, 1997, the Petitioner filed a Complaint in the United States District Court Southern District of New York against the Respondents.

On April 24, 2001, the District Court denied the parties' cross-motions for summary judgment, granted the Respondents' motion to compel arbitration, and ordered that the Petitioner's in rem claim and the in personam claim against the vessel's managers to proceed in London arbitration over the Petitioner's objection that English law and practice provides no remedy for the Petitioner's in rem claim, and the managers are liable for their own negligence outside the bill of lading contract.

Final judgment was entered May 1, 2001, dismissing the action as to all defendants, including the vessel in rem, in favor of London arbitration over the Petitioner's further objection that London arbitration had already taken place

with Petitioner's case being dismissed for lack of jurisdiction.

The Petitioner appealed to the United States Court of Appeals for the Second Circuit. The Appeals Court affirmed the District Court's decision on July 9, 2002.

The Petitioner has filed a Petition for Certiorari to this Honorable Supreme Court based upon the issues and argument presented herein.

Statement of the Facts

The original action was commenced by Salim Oleochemicals, Inc.[1], the "Petitioner", against the ocean vessel M.V. Shropshire in rem, and against the vessel's owner, its charterer, and its managers in personam, hereinafter collectively referred to as "Respondents", for contamination damage to a bulk shipment of edible glycerin carried in the vessel's cargo tanks. The cargo became contaminated with hydraulic oil aboard the vessel and was sold at salvage resulting in damages. The Petitioner was the consignee and holder of the bill of lading issued by an agent for the Master. A Contract of Affreightment ("COA") dated November 7, 1995, between the shipper, Salim Oleochemicals Pte., and the charterer, Botany Bay Tankers International ("Botany Bay") was incorporated by reference into the bill of lading and contained a London arbitration clause.

The District Court action was stayed pending arbitration in London under the COA between the Petitioner and Botany Bay pursuant to the Order on Consent dated February 24, 1998. The London arbitrators dismissed the arbitration finding neither the Petitioner nor Botany Bay were parties to the COA. The stay of the District Court action was

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[1] The Petitioner was a Delaware corporation engaged in the international trading of bulk oils, and purchased a bulk cargo of edible glycerine on C&F terms for importation to Newark, NJ from Belawan, Indonesia.

lifted on August 18, 2000, and the Petitioner moved for summary judgment. In its motion, the Petitioner sought summary judgment on the vessel's liability for damage to the cargo and moved to strike the Respondents' affirmative defense under COGSA of a $500 per customary freight unit limitation of liability. The Respondents counter-moved for summary judgment and moved to compel all parties to arbitrate in London. The District Court denied the summary judgment motions and granted the Respondents' motion to compel all parties to arbitrate the in rem and the in personam claims in London and dismissed the case.[2]

The Petitioner filed an appeal to the United States Court of Appeals for the Second Circuit pursuant to 9 U.S.C. §16(a)(3). On July 9, 2002, the Appeals Court affirmed the district court's decision.

REASONS FOR GRANTING THE WRIT

I. THE DISMISSAL OF THE PETITIONER'S IN REM ACTION BY THE LOWER COURTS DEPRIVED THE PETITIONER OF A REMEDY FOR ITS IN REM RIGHTS AGAINST M.V. SHROPSHIRE.

The Carriage of Goods by Sea Act ("COGSA"), 46 USC. 1300, et. seq., was enacted in 1936 "to define by law the rights and liabilities of water carrier and shippers in foreign commerce." See Uniform Ocean Bills of Lading – Hague Rules, H.R. Rep. NO. 2218, 74th Cong., 2d Sess. 1 (1936). By its terms, COGSA applies to "every bill of lading or similar document of title which is evidence of a contract

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[2] The COA contained a "Law" clause that stated: ". . . charter-party arbitration to be conducted in London. English law to apply." Neither the Petitioner, the vessel, its manager, nor its owner were parties to the COA.

for the carriage of goods by sea to or from ports of the United States in foreign trade. 46 USC 1300. Because the bills of lading drafted by carriers had historically contained various clauses designed to insulate the carriers from any liability for cargo damage --- in conflict with the goals of COGSA – the statute sought to make bills of lading simile and uniform and restricted a carrier's ability to avoid liability by inserting limiting conditions in the bill of lading, specifically clauses that "relieves" or "lessens" the carrier's liability. 46 USC 1303(8).

The essence of the Petitioner's argument is that since the London arbitrator does not have jurisdiction to render an enforceable decision in an in rem proceeding then the arbitrator is relieving or lessening the carrier's liability in direct conflict with COGSA.

The Petitioner's right to proceed against the M.V. Shropshire, in rem, to enforce its maritime lien for cargo damage caused aboard the vessel is a distinctive remedy under U.S. maritime law administered exclusively by the U.S. federal courts, 28 U.S.C. 1333; Hine v. Trevor, 71 U.S. (4 Wall) 555 (1867); Madruga v. Superior Court of California, 346 U.S. 556 (1954).

English law does not recognize maritime liens for cargo damage, and English practice does not permit London arbitrators to adjudicate in rem claims. The lower courts improperly relinquished its jurisdiction over the Petitioner's in rem action by dismissal and referral of the in rem action to London arbitration. Bell v. Hood, 327 U.S. 678 (1946); and see, Mackensworth v. S.S. American Merchant, 28 F.3d 246, 252 (2d Cir. 1994), reversing the district court's dismissal of an in rem claim secured by a letter of undertaking for lack of subject matter jurisdiction upon de novo review.

The maritime lien gives the claimant a property right in the vessel. The Lotwanna, 88 U.S. (21 Wall) 558, 579, 22, L.Ed. 654 (1874); see, Personification of the Vessel: Fact or

Fiction?, Hon. Alex T. Howard, Jr., Journal of Maritime Law and Commerce, Vol. 21, no. 3, July, 1990, p. 319. 2 Benedict on Admiralty §22, pp.2-6-2-8 (7th ed. 1997) observed that:

> "The characteristic virtue of a proceeding in rem is that it operates directly upon the res as the titular respondent in the suit and the actual subject matter of the jurisdiction and not, as at common law, mediately through the right, title or interest of a party brought before the court as defendant through personal service or the mere attachment of property as his with a view to subject his interest therein to the satisfaction of judgment."

Federal courts, both historically and recently, have consistently acknowledged the special characteristics of in rem admiralty actions. See, California v. Deep Sea Research, Inc. , 523 U.S. 491, 118 S.Ct. 1464, 149 L.Ed. 626 (1998). As Judge Brown of the Fifth Circuit Court of Appeals explained:

> "As hoary as the classic nautical aphorism of the seaman's lien for wages extending to the last plank, the notion is deeply ingrained that once the cargo is aboard, the cargo is bound to the ship and the ship is bound to the cargo. Responsibility of the vessel, and not here distant, unavailable, inaccessible owner or without reliance on the presence of some impecunious, irresponsible, temporary user, serves a useful purpose in the law. See 1 BENEDICT, ADMIRALTY, §§11, 12, pp. 17, 22 (Knauth's ed. 1940). And 'useful for this

> purpose still,' the law even in this 'day and generation' afford effectual utility to the in rem liability of the ship. Continental Grain Co. v. Barge F.B.L.585, 1960, 364 U.S. 19, 80 S.Ct. 1470, 4 L.Ed.2d 1540, 1960 AMC 249; and Smith v. The SS Mormacdale, 198 F.2d 849, 850 [3rd Cir. 1952]; Companie De Navigation, Etc. v. Mondial United Corp., 316 F.2d 163, 172-73 (5th Cir. 1963).

Courts throughout the country have rendered a different decision that that adopted by the Second Circuit Court of Appeals. The Fifth Circuit in Belcher Co. v. Maratha Mariner, 724 F.2d 1161, 1983 AMC 1679, (5th Cir. 1984), stated:

> "In the *in rem* proceeding the owner bears no personal liability. The vessel is sold solely to satisfy the lien. If the proceeds of the sale are inadequate, there is no liability on the owner's part for the residue. Indeed the admiralty court will not render a personal judgment against the owner in excess of the amount of the release bond."

The Ninth Circuit has also spoken on the distinctive character of in rem proceedings in the context of the proper parties to an appeal in, All Pacific Trading Inc. v. Hanjin Container Line Inc., 7 F.3d 1427, 1994 AMC 365, 368 (9th Cir. 1994):

> "We are reluctant to collapse the distinction between the vessel and her owner in these circumstances. Generally, a vessel is viewed as a juristic person, responsible *in rem* for the

> acts and omissions of her personnel, separate and distinct from her owner. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 224 (1945); *The Barnstable*, 181 U.S. 464, 467 (1901)"

This distinction is carried forward in the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, and various maritime statutes, such as the Ship Mortgage Act and the Maritime Line Act, 46 U.S.C. §§31303, 31307, 31325(b), 31326(a), 31342(2) (1988), FSIA 28 U.S. C. §§1605(b), 1610, LHWCA, 33 U.S.C. §905(b).

The Second Circuit has long recognized the significance of separate remedies for in rem and in personam claims. Seguros Banvenez S.A. v. S/S Oliver Drescher 761 F.2d 855 (2nd Cir. 1985):

> "Under traditional doctrines of maritime law, a vessel such as the S/S Oliver Drescher may be held liable for its torts and contracts even though its owners may not." *Id.* at 863.

The Second Circuit recently reaffirmed the distinctive nature of in rem claims in *Central Hudson v. Empressa Naviera Santa S.A., 56 F.3d 359,* 1996 AMC 163 (2d Cir. 1995) and in *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (1967)(the Court found that COGS invalidated a clause designating a foreign judicial forum because it "puts a high hurdle in the way of enforcing liability, and thus is an effective means for carriers to secure settlements lower than if cargo owners could sue in a convenient forum."). *Id.* at 203.

The Petitioner requests recognition of the same distinction where both in rem and in personam claims are

brought in the same action. The lower courts should have severed the in rem action from the in personam action and retained jurisdiction over the timely filed in rem action.

II. THE SECOND REFERRAL OF PLAINTIFF'S IN REM CLAIM TO LONDON ARBITRATION RELIEVES THE SHIP OF LIABILITY IN CONTRAVENTION OF COGSA 1303(8).

Foreign arbitration clauses frustrate Congress' objective to achieve through COGSA the "uniformity and simplification" of bills of lading, Uniform Ocean Bills of Lading – Hague Rules, H.R. No. 2218, 74th Cong. 2d Sess. 6-7 (1936); they introduce undersirable "uncertainty concerning the responsibilities and liabilities of carriers, the responsibilities and rights of shippers and liabilities of underwriters who insure cargo.

Section 1303(8) of the U.S. Carriage of Goods by Sea Act, 46 App. U.S.C. 1300 et seq. provides that a clause in a contract of carriage that relieves or lessens the liability of the "carrier or the ship" for cargo damage is null and void. The lower courts' dismissal and referral of all claims to London arbitration, including the in rem claim against the M.V. Shropshire, relieves the in rem appellee-defendant herein from any liability for the Petitioner's damages herein because English law does not recognize a maritime lien for cargo damage nor grants jurisdiction to London arbitrators to adjudicate in rem claims. The interference of foreign arbitration clauses with COGSA is especially damaging where the clause is coupled with a bill-of-lading requirement that foreign law will be applied by the foreign arbitrators.

Significantly, §1303(8) of COGSA provides:

> "8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this section or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect." [emphasis added].

The United States Supreme Court in Vimar Seguros v. M/V SKY REEFER, 515 U.S. 528, 115 S. Ct. 2322, 132 L. Ed.2d 462 (1995), recognized that there would be circumstances where the choice-of- forum and choice-of- law clauses operating in tandem would result as a waiver of a party's rights to pursue statutory remedies and hence, would be condemned as against public policy. *Id.* 515 U.S. at 540, 115 L.Ed 2d at 2330:

> ". . . [W]ere we persuaded that 'choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . ., we would have little hesitation in condemning the agreement as against public policy.' *Mitsubishi Motors corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637,n. 19."

The SKY REEFER decision dealt with a foreign forum selection clause in a bill of lading, and the Court characterized forum arbitration clauses as a mere subsect of forum selection clauses. Several cases from various U.S. District Courts have denied motions seeking to dismiss in rem claims under foreign forum selection clauses where the foreign forum and law does not recognize in rem liability.

Judge Rakoff of the Southern District of New York in International Marine Underwriters v. M/V KASIF KALKAVAN, 1998 AMC 765 (SDNY 1998), specifically refused to follow the Ninth Circuit's reasoning in Fireman's Fund Ins. Co. v. Cho Yang Shipping Co., Ltd., 1998 AMC 583, 131 F.3d 1336 (9th Cir. 1997), *cert denied,* 119 S.Ct. 275 (1997), and held the in rem claim should not be dismissed in favor of a Korean forum.

> "It is true that the remaining difficulty, *viz.*, plaintiff's inability under Korean law to bring an *in rem* action against the vessel, would appear to deprive plaintiff of one of the substantive rights expressly guaranteed by §3(8). That section forbids 'any clause . . . in a contract of carriage relieving the carrier *or the ship* from liability . . . or lessening such liability,' 46 U.S.C. app. §1303(8) (emphasis added), a clear reference to an *in rem* proceeding. That language would be rendered meaningless if an *in rem* action were viewed as a procedural device not protected under §3(8) as interpreted by *Sky Reefer*. Nor is the Court persuaded by the Ninth Circuit's recent decision in *Fireman's Fund Ins. Co. v. Cho Yang Shipping Co., Ltd.*, 1998 AMC 583 (9th Cir. 1997), which reached the opposite conclusion, for the court there appears wholly to have ignored the above quoted statutory language that refers to the ship's own liability. *See id.* at 587." *Id.* AMC 767.

In Allianz Ins. Co. of Canada v. Cho Yang Shipping Co., 131 F.Supp. 2d. 787, 795 (E.D. Va. 2000), Judge Smith of that Court stated:

> "[I]t would be unreasonable and unjust to enforce the forum selection clause as to *D.S.R. America*, the *in rem* defendant, because an *in rem* action is unavailable under the forum law (Korea), and thereby reduces Allianz's rights under COGSA."

The same line of reasoning as to the in rem action can be gleaned from the other district court cases. In Hyundai Corp. U.S.A., Inc. v. M/V AN LONG JIANG, 1998 AMC 854 (SDNY 1998), Judge Patterson also found that the "plaintiff is free to continue its suit in this District against the Chinese shipowner and the *in rem* vessel." *[emphasis added] Id.* AMC at 856.

More recently, Judge David C. Norton of the U.S. District Court for the District of South Carolina, Charleston Division, in Tokio Marine & Fire Ins. Co. v. M/V TURQUOISE, 2001 U.S. Dist. LEXIS 14689 (D.S.C. 2001), wisely adopted the same reasoning as set forth in KASIF KALKAVAN, and denied the defendant vessel's motion to dismiss the in rem claim pursuant to a foreign (Korea) forum selection clause in the bill of lading.

This principle is precisely set forth in Karobi Lumber v. The Norco, 1966 AMC 315, 317, 249 F.Supp 324 *aff'd* 397 F.2d 570, 1968 AMC 1524, 1527 (5th Cir. 1968), which was also a case involving cargo damage under bills of lading issued under a charter party which contained a prohibition of lien clause. The District Court held:

> "The injury complained of herein is based upon an allegation of breach of duty to provide a seaworthy ship. Since bills of lading issued pursuant to a charter party must conform to COGSA, a bill of lading cannot be subject to an agreement which violates

> COGSA. The lien prohibition clause contained in the charter party agreement is unenforceable insofar as it attempts to insulate the vessel from liability for negligence in an action brought by a shipper who has a bill of lading. COGSA expressly prohibits such exemptions from liability in a contract of carriage. 46 U.S. Code, § 1303(8).
>
> The fact that the exemption from liability does not expressly appear on the face of the bill of lading does not bring the clause from the charter party beyond the scope of COGSA. The bill of lading was issued subject to the charter party and the protective measures guaranteed by COGSA cannot be defeated by resort to extraneous agreements. It cannot be said that a bill of lading complies with the terms of COGSA when issued under a charter party if the bill of lading cannot guarantee the *in rem* liability of the vessel. *See Gilmore and Black, Admiralty (1957) § 4-24, p. 219.*"

On appeal to the Court of Appeals by the ship, the Court affirmed, holding:

> "The gist of the injury complained of in the present case is breach of duty to provide a seaworthy ship, and the evidence overwhelmingly sustains the lack of seaworthiness of the S.S. Norco. Dodds contended that *Compagnie De Navigation vs. Mondial United Corp., 1963 AMC 946, 316 F.(2d) 163 (5 Cir., 1963),* was governing. The general rule that a charter party can expressly

> restrict liability of the vessel is stated in that case. Such statement, however, must be qualified by the fact that the exemptions are permissible only so long as not rendered void by the statute. Therefore, even in view of the fact that Karobi had reason to know of the existence of a charter party the lien prohibition clause contained in the charter party is unenforceable by virtue of the express provisions of 46 U.S. Code, § 1303(8). The judgment of the trial court is affirmed." 1968 AMC at 1527.

Similarly here, the Petitioner sued the vessel *in rem* claiming unseaworthiness and a maritime tort. Since under U.S. law such a claim gives rise to a maritime lien against the vessel under COGSA, the fact that English law precludes such a claim renders the English proceedings void as to plaintiff's *in rem* claim.

> Although the Federal Arbitration Act permits valid U.S. proceedings to be stayed pending foreign arbitration, U.S. Courts are required to scrutinize such proceedings to determine whether the parties' rights under U.S. law are protected. 9 U.S.C. Section 2.

Under English law, the M/V Shropshire will not be subjected simply to "lesser" liability, but rather, will avoid liability altogether by the referral to London arbitration thereby defeating COGSA and the Federal Arbitration Act. This Court should adopt the holding of *Encyclopaedia Britannica, Inc. v. SS Hong Kong Producer*, 422 F.2d 7, 12 (2d Cir. 1969), *cert. denied*, 397 US 964 (1970), which held that the foreign arbitration clause is but the latest in a long

line of bill-of-lading clauses having "the strong likelihood of not only lessening the liabilities of the carrier but also stripping the shipper of all the protection afforded it by COGSA. *Id.* at 13. So there is a direct conflict between COGSA and the Federal Arbitration Act.

The Petitioner's argument is supported with law throughout the past century. Knott v. Botany Worsted Mills, 179 U.S. 69 (1900)(foreign law clauses in ocean bills of lading null and void); Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974) (a foreign arbitration clause, "a specialized kind of forum-selection clause," is equally invalid and unenforceable under COGSA); State Establishment for Agricultural Product Trading v. M/V Wesermunde, 838 F.2d 1576 (11th Cir.), cert. denied, 488 U.S. 916 (1988) (the Court held that Section 3(8) of COGSA invalidates foreign arbitration clauses, just as it does foreign suit clauses because foreign suits tend to lessen the liability of the carrier.).

Foreign arbitration clauses run afoul of the policies of COGSA. Congress enacted COGSA to "ensure uniformity in the basic rights and responsibilities arising out of bills of lading in order to "enhance the currency and negotiability of ocean bills of lading on the premises that uniformity and simplification of bills of lading will of immense value to shippers..." *Mitsuit & Co., Ltd. V. American Export Lines, Inc.*, 636 F.2d 807, 815 (2d Cir. 1981); *Portland Fish Co. v. States Steamship Co.*, 510 F.2d 628, 632 (9th Cir. 1974); H.R. Rep. No. 2218, 74th Cong. 2d Sess.7 (1936).

Therefore, since the London arbitrator cannot render a binding decision on the in rem claim and due to the conflict between COGSA and the Federal Arbitration Act in this specific situation, the lower courts decision should be reversed. Foreign arbitration clauses cannot be squared with the purposes of COGSA – to promote the uniformity and certainty, and thus the negotiability of maritime bills of land.

III. THE VESSEL'S MANAGERS ARE NOT SUBJECT TO ARBITRATION AND ARE ANSWERABLE FOR THEIR OWN ACTS OF NEGLIGENCE IN CAUSING THE PETITIONER'S LOSS.

The lower courts clearly erred by dismissing the complaint as to Bibby International Services (IOM) Ltd., the vessel's manager, and Botany Bay Management, charterer's manager, who are liable for their own acts or omissions in managing the vessel and crew. Cerro Sales Corp. v. Atlantic Marine Ent., Inc., 403 F. Supp. 562 (SDNY 1975).

Only the ship and the charterer who issues the bill of lading are subject to liability under the bill of lading per COGSA. Here the bill of lading mentions only Botany Bay Parcel Tankers. That is of course the reason that defendants' counsel originally agreed to restrict the London arbitration to Botany Bay Parcel Tankers.

Respondents Bibby and Botany Bay Management Services are sued only as managers for their own negligence – a suit in tort and not in contract and there any arbitration claim in tort should be held null and void since the Federal Arbitration Act is inapplicable.

In Delphinus Maritima S.A., as owner of the M/V MARI BOEING, 523 F.Supp. 583, 1981 AMC 2362, (SDNY 1981), Judge Motley held:

> "Intermarine and MTO are also directly liable to cargo claimants in tort for their negligence. An agent is not covered by the limitations of COGSA available to the carrier, and may be fully liable for its acts of negligence. *Cerro Sales Corp. v. Atlantic Marine Enterprises, Inc.*, 1976 AMC 375, 381, 403 F.Supp. 562,568, (SDNY 1975).

Other jurisdictions have held the tort actions separate and not subject to arbitration under the COA. See *Asoma v. Kubbar*, 1998 AMC 100 (SD Texas 1997); TradeArbed, Inc. v. M/V AGIA SOPHIA, 1997 AMC 2838 (DNJ 1997); Joo Seng Hong Kong v. S.S. Unibulkfir, 483 F. Supp. 43 (SDNY 1979).

Therefore, defendants Botany Bay Management and Bibby have no right to claim the benefits of the arbitration clause in the bill of lading or the COA and the action as to the vessel managers should have never been dismissed.

The district court failed to recognize the independent nature of the in rem claims against the vessel from the in personam claims against the charterer and owner. The referral to arbitration should not have included the in rem claim or the in personam claims against the vessel managers.

The Petitioner sought the severance of the in personam Respondents subject to arbitrate in London from the in rem defendant and in rem claim. The in rem remedy can not be adjudicated by the London arbitrator, but can and should be adjudicated in the U.S. federal court independent of any liability of the in personam Respondents.

The Petitioner will be prejudiced by the failure to sever the in rem from the in personam actions because the claims are now time-barred under COGSA's one year statute of limitations, COGSA §1303(6). The in rem defendant will suffer no prejudice as it was never contemplated that the in rem defendant would arbitrate under the terms of the Order on Consent, and the in rem defendant has participated in this action from its commencement.

The availability of the in rem remedy in federal court will preserve this cornerstone of U.S. maritime law. Without an in rem remedy, the Petitioner's rights against the vessel for loss or damage to cargo are unenforceable.

CONCLUSION

The Petitioner, Salim Oleochemicals, Inc., respectfully requests that this Honorable Court grant this Petition for Certiorari due to the salient issues of maritime law presented in this brief. The Petitioner's in rem claims were erroneously dismissed and transferred to a foreign arbitrator that had previously recognized that it lacked jurisdiction. This Honorable Court should reverse the lower courts' decision and remand with proceedings in the United States Federal Courts and in not a foreign forum.

KINGSLEY, KINGSLEY & CALKINS,
Attorneys for the Petitioner,

BY:_____
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(516) 931-0064 SC 5783

(Any footnotes trail the end of each document.)
Docket No. 01-7624

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Salim Oleochemicals,
Plaintiff-Appellant,

v.

M/V Shropshire, et al.,
Defendants-Appellees.

August 20, 2001, Submitted

January 18, 2002, Decided

JUDGES:
Before: SACK, SOTOMAYOR, and KATZMANN, Circuit Judges.

OPINIONBY:
SOTOMAYOR

OPINION:

OTOMAYOR, Circuit Judge:

Plaintiff Salim Oleochemicals, Inc. ("SOI") purchased a cargo of glycerine in 1996 and contracted to ship the cargo from Indonesia to New Jersey. SOI was the consignee on the shipment's bill of lading. The bill explicitly incorporated a contract of affreightment between defendant Botany Bay Parcel Tankers International ("BBPTI") and Salim Oleochemicals Pte. Ltd., providing that any arbitration was to be conducted in London.

After the cargo arrived damaged by contamination, SOI sold it for salvage and brought an action for monetary damages against all of the defendants -- M/V Shropshire, Bibby International Services (IOM) Ltd., Langston Shipping Ltd., BBPTI, and Botany Bay Management Services Pty. Ltd. (collectively, "defendants"). Thereafter, defendants requested that the action be stayed pending arbitration in London, as provided for in the contract of affreightment. SOI agreed to the arbitration, but sought to arbitrate the dispute only under the terms of the contract of affreightment, not the bill of lading in which the contract was incorporated. Defendants contended that the arbitrator lacked subject matter jurisdiction because SOI was not a signatory to the contract. When SOI refused to bring the arbitration claims under the terms of the bill of lading, the arbitrator granted defendants' motion to dismiss for lack of subject matter jurisdiction.

Following the arbitrator's ruling, SOI reopened its action in the district court and moved for summary judgment. The defendants opposed the motion and moved to compel SOI to bring the action, under the contract as incorporated in the bill of lading, in a London arbitration. SOI then moved for sanctions against the defendants for moving to compel arbitration.

The United States District Court for the Southern District of New York (Buchwald, J.) granted defendants' motion and denied SOI's motion. The district court also denied SOI's subsequent motion for reconsideration and request for certification of the court's prior order pursuant to 28 U.S.C. § 1292(b). The district court dismissed the case without prejudice to SOI's right to reopen it at the conclusion of the arbitration proceedings. SOI appeals from the district court's order, and defendants now move to dismiss the appeal on the grounds that this is an "embedded" action and thus not appealable under the law of this circuit. Pursuant to the Supreme Court's decision in Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 148 L. Ed. 2d 373, 121

S. Ct. 513 (2000), we hold that a dismissal without prejudice in favor of arbitration is an appealable "final decision" under 9 U.S.C. § 16(a)(3) and that Green Tree has overruled our precedents that distinguish between "independent" and "embedded" actions for purposes of appealability. We therefore deny defendants' motion to dismiss the appeal.

DISCUSSION

Section 16 of the Federal Arbitration Act ("FAA") governs the appealability of arbitration orders. 9 U.S.C. § 16. It provides that an immediate appeal may be taken from "a final decision with respect to an arbitration that is subject to this title." Id. § 16(a)(3). However, an immediate appeal does not lie, absent certification pursuant to 28 U.S.C. § 1292(b), from an "interlocutory order . . . granting a stay of any action under section 3 of this title; . . . directing arbitration to proceed under section 4 of this title; . . . [or] compelling arbitration under section 206 of this title." n1 Id. § 16(b).

We have previously held that the issue of whether an arbitration order is immediately appealable depends upon whether the underlying action is "independent" or "embedded." CPR (USA) Inc. v. Spray, 187 F.3d 245, 252 (2d Cir. 1999); Ermenegildo Zegna Corp. v. Zegna, 133 F.3d 177, 181 (2d Cir. 1998); Filanto, 984 F.2d at 60-61. We considered an action "independent" where "the plaintiff seeks an order compelling or prohibiting arbitration or a declaration that a dispute is arbitrable or not arbitrable, and no party seeks any other relief." Filanto, 984 F.2d at 60. In contrast, an action was deemed "embedded" where the plaintiff seeks some relief in addition to an order addressing the arbitrability issue. Id. Our rule was that an order compelling arbitration in an "independent" action was a final, appealable judgment under the FAA but that such an order in an "embedded" action could not be appealed. Id.

In Green Tree Financial Corp. v. Randolph, however, the Supreme Court established a different analytical approach for determining whether an arbitration order is an appealable "final decision" under 9 U.S.C. § 16(a)(3) or an unappealable "interlocutory order" under § 16(b). 531 U.S. at 86-89. The Court held that an order dismissing an entire action with prejudice and ordering arbitration is an appealable final decision under § 16(a)(3), regardless of whether the action would be deemed "independent" or "embedded" by courts, like ours, that embraced that distinction. 531 U.S. at 88-89. Rather, the Court applied the "well-developed and longstanding" definition of "final decision": "It is a decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment." 531 U.S. at 86 (internal quotations marks omitted). The Court explained,

> Certainly the plain language of the statutory text does not suggest that Congress intended to incorporate the rather complex independent/embedded distinction, and its consequences for finality, into § 16(a)(3). We therefore conclude that where, as here, the District Court has ordered the parties to proceed to arbitration, and dismissed all the claims before it, that decision is "final" within the meaning of § 16(a)(3), and therefore appealable.

531 U.S. at 88-89. The Court further noted that, had the district court simply entered a stay rather than a dismissal, the order would not have been appealable. 531 U.S. at 87 n.2 (citing § 16(b)(1)).

Thus, the analysis prescribed in Green Tree displaces our approach which turned on the independent/embedded distinction. n2 Cf. Seacoast Motors of Salisbury, Inc. v. DaimlerChrysler Motors Corp., 271 F.3d 6, 8 (1st Cir. 2001)

(noting that Green Tree rejected the First Circuit's independent/embedded distinction); Interactive Flight Techs., Inc. v. Swissair Swiss Air Transp. Co., 249 F.3d 1177, 1179 (9th Cir. 2001) (finding that the Ninth Circuit's precedents embracing the distinction between "independent" and "embedded" actions for appealability purposes are "no longer good law" in light of Green Tree); Employers Ins. of Wausau v. Bright Metal Specialties, Inc., 251 F.3d 1316, 1321-22 (11th Cir. 2001) (finding appellee's arguments based on the Eleventh Circuit's independent/embedded distinction to be "foreclosed by the Supreme Court's recent opinion in Green Tree").

Unlike the action in Green Tree, the dismissal in the instant case was without prejudice to reopening upon issuance of the arbitrator's decision. In this circuit, however, "dismissals with and without prejudice are equally appealable as final orders." Allied Air Freight, Inc. v. Pan Am. World Airways, Inc., 393 F.2d 441, 444 (2d Cir. 1968); see also Elfenbein v. Gulf & Western Indus., Inc., 590 F.2d 445, 449 (2d Cir. 1978); Rinieri v. News Syndicate Co., 385 F.2d 818, 821 (2d Cir. 1967). There is thus no reason to think that a dismissal without prejudice is any less a "final decision" under Green Tree than is a dismissal with prejudice. See Interactive Flight Techs., 249 F.3d at 1179 (a dismissal is an appealable final order pursuant to Green Tree even if it is "without prejudice"); see also Employers Ins. of Wausau, 251 F.3d at 1322 n.6 ("Although the district court did not specify whether the dismissal was with or without prejudice, the arbitration order clearly disposed of the entire case on the merits and left no part of it pending before the court. Moreover, the district court could have, but did not, stay the case pending arbitration.") (citing Green Tree, 531 U.S. at 87 n.2). Thus Green Tree, read in light of this Court's precedents, compels the conclusion that a dismissal without prejudice in favor of arbitration is an appealable decision under the FAA.

We urge district courts in these circumstances to be as clear as possible about whether they truly intend to dismiss an action or mean to grant a stay pursuant to 9 U.S.C. § 3, which supplies that power, or whether they mean to do something else entirely. Courts should be aware that a dismissal renders an order appealable under § 16(a)(3), while the granting of a stay is an unappealable interlocutory order under § 16(b). Our recognition of the "pro-arbitration tilt of the statute," Filanto, 984 F.2d at 61, drove our previous use of the independent/embedded distinction and remains an important policy consideration. Unnecessary delay of the arbitral process through appellate review is disfavored. Cf. Ermenegildo Zegna, 133 F.3d at 180. District courts should continue to be mindful of this "liberal federal policy favoring arbitration agreements," 133 F.3d at 180 (quotation marks omitted), when deciding whether to dismiss an action or instead to grant a stay.

CONCLUSION

For the reasons stated, defendants' motion to dismiss plaintiff's appeal is denied. The clerk's office is directed to issue an order scheduling briefing on this appeal.

Footnotes

n1 Where there has been no certification pursuant to § 1292(b), the collateral order doctrine cannot be used to circumvent the appealability provisions of the FAA, regardless of whether the order mandates arbitration or refuses to stay an action pending arbitration. See Filanto, S.P.A. v. Chilewich Int'l Corp., 984 F.2d 58, 60 n.2 (2d Cir. 1993).

n2 We note that, given the flexibility with which we applied the independent/embedded distinction, the differences between the Green Tree approach and our precedents may not be dramatic. For example, in CPR (USA) Inc., we found an action seeking a stay of arbitration to be independent, and thus appealable, where the other portions of the claim were dismissed on jurisdictional grounds. 187 F.3d at 253-54. We reasoned that "if the district court, having ordered the parties to arbitrate, has no independent substantive issue left before it -- only issues relating to the validity of the arbitrator's award -- then the order compelling arbitration is, effectively, a final order and an immediate appeal will be proper." 187 F.3d at 253. While we note the similarity between this analysis and the new Green Tree approach, we need not decide whether the two approaches would yield the same result in the instant case.

01-7624

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SALIM OLEOCHEMICALS, INC.,
Plaintiff-Appellant,

-v.-

M/V SHROPSHIRE, her engines, boilers, tackle, etc., BIBBY INTERNATIONAL SERVICES (IOM) LTD., LANGSTON SHIPPING LTD, BOTANY BAY PARCEL TANKERS INTERNATIONAL, BOTANY BAY MANAGEMENT SERVICES PTY LTD.,
Defendants-Appellees,

LANGSTON SHIPPING,
Claimant-Appellee.

July 9, 2002, Decided

COUNSEL:
APPEARING FOR APPELLANT: STEVEN P. CALKINS, Kingsley, Kingsley & Calkins, Hicksville, NY.

APPEARING FOR APPELLEES: J. SCOT PROVAN, Hill Rivkins & Hayden LLP, New York, NY.

JUDGES:
PRESENT: HON. DENNIS JACOBS, HON. PIERRE N. LEVAL, HON. ROBERT A. KATZMANN, Circuit Judges.

OPINION:

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be AFFIRMED.

Plaintiff-Appellant Salim Oleochemicals, Inc., ("Salim") appeals from the order entered in the United States District Court for the Southern District of New York (Buchwald, J.) granting defendants-appellees' motion to compel arbitration. We affirm because Salim has failed to identify any error or abuse of discretion by the district court that warrants reversal or remand.

The judgment of the district court is hereby AFFIRMED.

97 Civ. 3093(NRB)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SALIM OLEOCHEMICALS, INC.,
Plaintiff,

- v -

M/V SHROPSHIRE, et al.,
Defendants.

June 26, 2001, Decided

COUNSEL:
For SALIM OLEOCHEMICALS, INC., plaintiff: Harold M. Kingsley, Harold M. Kingsley, Hicksville, NY.

For BIBBY INTERNATIONAL SERVICES (IOM) LTD., LANGTON SHIPPING LTD, BOTANY BAY PARCEL TANKERS INTERNATIONAL, defendants: J. Scot Provan, KIRLIN, CAMPBELL, MEADOWS & KEATING, NEw York, NY.

JUDGES:
NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

OPINIONBY:
NAOMI REICE BUCHWALD

OPINION:

ORDER
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Plaintiff Salim Oleochemicals, Inc. ("plaintiff" or "Salim") moves for reargument of this Court's Memorandum and Order entered on April 27, 2001 ("Order"), n1 referring the parties to arbitration in London, and, alternatively, for certification of immediate appeal under 28 U.S.C. 1292(b). Pursuant to this Court's Local Rules, a motion for reconsideration can be made "setting forth concisely the matters or controlling decision which counsel believes the court has overlooked." Local Rule 3(j). The only basis for a motion to reconsider is that the court has overlooked matters or controlling decisions which, had they been considered, might have "materially influenced the earlier decision." Park South Tenants Corp. v. 200 Central Park South Associates, 754 F. Supp. 352, 354 (S.D.N.Y. 1991) (citing Caleb & Co. v. E.I. DuPont De Newmours & Co., 624 F. Supp. 747, 748 (S.D.N.Y. 1984), aff'd, 841 F.2d 112 (2d Cir. 1991)).

Plaintiff contends that this Court overlooked controlling authority concerning plaintiff's in rem claims against the M/V Shropshire. Specifically, plaintiff alleges that our conclusion that "the London arbitrator has jurisdiction over the bond and, accordingly, may arbitrate Salim's claims against the Shropshire," Order at 15, failed to take account of the fact that English law does not recognize in rem jurisdiction and, accordingly, that the English arbitrator cannot decide plaintiff's in rem claims.

However, the burden is on plaintiff to demonstrate that a London arbitrator applying English law may not adjudicate a claim against a bond which was issued to free a vessel from in rem arrest. See Silgan Plastics Corp. v. M/V Nedlloyd Holland, 1998 U.S. Dist. LEXIS 5564, 1998 A.M.C. 2163, 1998 WL 193079, at *4 (S.D.N.Y. 1998) ("Because a forum selection clause is deemed presumptively valid, the party seeking to avoid its enforcement has the burden of establishing the lessening of carrier's liability to a cargo owner under foreign law." [citing Vimar Seguros v Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 538, 132

L. Ed. 2d 462, 115 S. Ct. 2322 (1995)). Plaintiff has not met this burden. Courts within this district and without have repeatedly compelled foreign litigation or arbitration over plaintiffs' objections that the foreign forums do not recognize in rem claims. See, e.g., Reed & Barton Corp., et. al. v. M.V. Tokio Express, et al., 1999 U.S. Dist. LEXIS 1807, 1999 AMC 1088, 1999 WL 92608, at *3 (S.D.N.Y. 1999)("Plaintiffs contend that enforcement of the forum selection clause would deprive them of their substantive rights guaranteed by COGSA because German law does not recognize in rem actions and offers no forum to enforce their liens against the [the vessel]... German law [like English law]... applies an international convention and amending protocols together known as the Hague-Visby Rules, a fraternal equivalent of COGSA. The Hague-Visby Rules contain a provision... which [recognizes a vessel's liability]. Plaintiffs have not shown that application of the Hague-Visby Rules will in any way 'reduce the carrier's obligations... below what COGSA guarantees.'" [quoting Sky Reefer, 515 U.S. at 538); Thyssen, Inc. v. M/V Markos N, et al., 1999 U.S. Dist. LEXIS 12578, 1999 A.M.C. 2515 (S.D.N.Y. 1999)(enforcing forum selection clause to arbitrate in rem claim in London); Fireman Fund Insurance Company v. M.V. Dsr Atlantic, 131 F.3d 1336, 1339 (9th Cir. 1997), cert denied 525 U.S. 921, 142 L. Ed. 2d 227, 119 S. Ct. 275 (1998) (refusing to invalidate forum selection clause despite the fact that the selected forum did not recognize in rem claims); Mitsui & Co., Inc. v. Mira M/V, et al., 111 F.3d 33 (5th Cir. 1997)(enforcing forum selection clause to adjudicate in London, inter alia, an in rem claim). In many instances, even when a foreign jurisdiction does not utilize in rem proceedings, it will still adjudicate the claim where, as here, a bond has been posted in lieu of the vessel's arrest. See Tokio Express, 1999 U.S. Dist. LEXIS 1807, 1999 WL 92608, at *3 ("Plaintiffs have not suggested any reason why the letter of undertaking will not secure any final judgment against the ship in rem. There is no reason to believe that the chosen

forum, namely the courts of Hamburg, will not give effect to the private security agreement adopted by the parties.").

Finally, it is clear that when uncertainty exists over whether a selected foreign forum will arbitrate maritime claims in a manner that does not lessen plaintiff's rights under COGSA, the Supreme Court favors enforcing the foreign selection clause while retaining jurisdiction to review the result at the enforcement stage. See Sky Reefer, 515 U.S. at 539-40 ("The District Court has retained jurisdiction over the case and 'will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the ... laws has been addressed.'" [citation omitted]"). Thus, we "close[] [this case] on the active docket of the Court without prejudice to the right of plaintiff to reopen it after the conclusion of the [English] proceedings if a final decision by a [English arbitrator] results in the reduction of the defendants' obligations in violation of COGSA...." Silgan Plastics, 1998 U.S. Dist. LEXIS 5564, 1998 WL 193079, at *4.

In the alternative, plaintiff requests in that this Court certify the issues raised in its motion for summary judgment for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). To qualify for interlocutory review under section 1292(b), a party must show (a) that there is a controlling question of law, (b) as to which there is substantial ground for difference of opinion, and (c) an immediate appeal would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Even assuming arguendo that the issue plaintiff raises is a "controlling question of law," this Court's decision on the motion to compel arbitration does not constitute a "substantial ground for difference of opinion." The issue presented was not "difficult and of first impression," Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 25 (2d Cir. 1990), nor have plaintiffs pointed to a substantial split in Second Circuit district court rulings on the issue. See Ayers v. Nat'l Vehicle Management Co, Inc., 1992 U.S. Dist.

LEXIS 16635, 1992 WL 321522 (W.D.N.Y. 1992). Accordingly, defendant's request for interlocutory review is denied.

CONCLUSION

For the reasons stated above, plaintiff's motion for reconsideration is denied. The Clerk of the Court is asked to close the case on the Court's active docket without prejudice to the right of plaintiff to reopen it after the conclusion of the London arbitration proceedings if the final decision results in the reduction of the defendants' obligations in violation of COGSA. Furthermore, plaintiff's request for certification for immediate appeal under 28 U.S.C. 1292(b) is denied.

IT IS SO ORDERED.

DATED: New York, New York

June 26, 2001

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Footnotes

n1 Familiarity with this Court's April 27, 2001, Memorandum and Order is assumed.

97 Civ. 3093 (NRB)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SALIM OLEOCHEMICALS, INC.,
Plaintiff,

- v -

M/V SHROPSHIRE, et al.,
Defendants.

April 24, 2001, Decided

April 25, 2001, Filed

COUNSEL:
For SALIM OLEOCHEMICALS, INC., plaintiff: Harold M. Kingsley, Harold M. Kingsley, Hicksville, NY.

For BIBBY INTERNATIONAL SERVICES (IOM) LTD., LANGTON SHIPPING LTD, BOTANY BAY PARCEL TANKERS INTERNATIONAL, defendants: J. Scot Provan, KIRLIN, CAMPBELL, MEADOWS & KEATING, New York, NY.

JUDGES:
NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

OPINIONBY:
NAOMI REICE BUCHWALD

OPINION:

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

This maritime action is brought by plaintiff Salim Oleochemicals, Inc. ("Salim" or "plaintiff") against M/V Shropshire ("Shropshire" or "the ship") in rem, Bibby International Services (ION) Ltd. ("Bibby"), Langton Shipping Ltd. ("Langton"), Botany Bay Parcel Tankers International ("Botany Bay"), and Botany Bay Management Services Pty. Ltd. ("Botany Management") (collectively "defendants"). Plaintiff sues for $ 737,136.67 in damages, plus interest and costs, arising from contamination to a liquid glycerine shipment. Pending before the Court are three motions: (1) defendants' motion to compel arbitration in London, (2) cross motions for summary judgment on the issue of limitation of liability, and (3) plaintiff's motion for sanctions against defense counsel. For the following reasons, (1) defendants' motion to compel arbitration in London is granted, (2) parties' cross motions for summary judgment are dismissed in light of the arbitration order, and (3) plaintiff's motion for sanctions is denied.

BACKGROUND n1

This is a maritime action for damage to a glycerine cargo shipment from Belwan, Indonesia to the Newark, New Jersey. Botany Bay contracted with Salim Oleochemicals, Pte. ("Salim Pte") n2 a foreign affiliate of Salim, under a Contract of Affreightment ("Contract") signed on November 7, 1995, to deliver several shipments of glycerine to Salim in Brazil and the United States. During the course of one of these shipments, the glycerine was contaminated by ship oil. Salim covered at a substantial loss and now seeks damages for that loss.

This suit is ultimately a contract action based upon two documents: the Contract and the shipment's Bill of Lading ("Bill") into which it was explicitly incorporated. The Contract, signed by Botany Bay and Salim Pte, contains a clause governing disputes arising from the Contract. It reads in relevant part:

> "16. Law General average and charterparty arbitration to be conducted in London. English law to apply."

The Bill for the shipment at was issued on April 23, 1996. It named the Shropshire as the vessel, Salim as the cargo's consignee, and Botany Bay and Salim Pte as charterers. The Bill explicitly incorporated the Contract, stating:

> "This shipment is carried under and pursuant to the terms of the contract of Affreightment/Charter party 'C.D.A. dated 07TH NOV 1995 between BOTANY BAY PARCEL TANKERS INTERNATIONAL and SALIMOLEOCHEMICALS PTE LTD AS CHARTERERS' as Charterer, and all terms whatsoever of the said Contract of Affeightment/Charter Party including the arbitration clause specified therein apply to and govern the rights of the parties concerned in this shipment." (emphasis added)

Salim filed this action on April 29, 1997. Pursuant to a demand by plaintiffs, Langton had filed a letter of undertaking for the Shropshire on November 25, 1996 and posted a $ 600,000 bond. Defendants moved to stay the action pending arbitration in London pursuant to the arbitration clause in the Contract as incorporated in the Bill. Before the motion was fully briefed, however, the parties consented to arbitration in London. Defendants' counsel, J. Scott Provan, faxed a draft stipulation to plaintiff's counsel, Harold Kingsley, on January 7, 1998. Defendants' counsel

included a cover note with the fax which read in relevant part:

> "Attached hereto is a proposed Stipulation staying the proceeding in the United States District court for the Southern District of New York pending arbitration in London.
>
> I have included Bibby International Services (ION) Ltd., Langton shipping Ltd. and Botany Bay Parcel tankers International as the parties to appear before the arbitrators in London. Obviously, Botany Bay Parcel Tankers International is a signatory to the COA [Contract of Affreightment] with Salim Oleochemicals Pte. Ltd. and we have included Bibby International Services (IOM) and Langton Shipping Ltd. as managers and owners of the M/V SHROPSHIRE. Salim Oleochemicals, Inc. are the purchasers of the cargo and purchased the cargo from Salim Oleochemicals Pte Ltd. and was named on the bill of lading.
>
> We have not included Botany Bay Management Services Pty. Ltd. as they signed the COA as managers for Botany Bay Parcel Tanker International and therefore are not part of the COA."

The draft stipulation attached read in relevant part:

> "The parties are directed to promptly institute arbitration pursuant to Clause 16 of the Contract of Affreigtment between Botany Bay Parcel Tankers and Salim Oleochemicals Pte., Ltd., Dated November 7, 1995 as incorporated in the terms and conditions of the Tanker Bill of Lading dated April 23, 1996 for the carriage of the cargo of glycerine."

However, plaintiff's counsel returned a draft order on consent for defendants' counsel's approval that differed from defendants' proposed stipulation. The defendants' counsel made only two substantive changes to plaintiff's proposed order, removing language that stated that the parties disputed who was subject to the arbitration clause but that the arbitrator would resolve this issue. Both counsel signed the final version of the order on consent which was "so ordered" by the Court on February 24, 1998. The final order read:

> "WHEREAS, defendants herein have moved for a stay pending arbitration in London under contracts of Affreightment dated November 7, 1995, between Botany Bay Parcel Tankers International and Salim Oleochemicals Pte Ltd., and the parties agree that plaintiff and Botany Bay Parcel Tankers International are subject to arbitrate thereunder,
>
> WHEREFORE, upon the subscribed consents hereunder, this action is ordered
>
> Stayed, pending arbitration in London under the Contract of Affreightment between Botany Bay Parcel Tankers International and Salim Oleochemicals Pte Lts., dated November 7, 1995."

However, when Salim (plaintiff herein, not Salim Pte) brought the arbitration in London, it brought it only under the Contract, not under the Bill. Defendants moved to have the matter dismissed for lack of subject matter jurisdiction because Salim was not a signatory to the Contract. However, Defendants first gave Salim the opportunity to amend its claim to sue under the Bill. Salim refused to do so. The London arbitrator thereafter dismissed the case, ruling that Salim indeed was not a party to the Contract and accordingly,

that the arbitration tribunal had no subject matter jurisdiction over its claim on the Contract.

Salim has now returned to this Court and seeks to have its claims heard on the merits. Defendants move to compel Salim to bring the action, under the Contract as incorporated in the Bill, in a London arbitration.

DISCUSSION

To place the current motion in context it is helpful to consider why plaintiff has been so eager to proceed exclusively under the Contract rather than under the Bill which incorporated the Contract. The likely reason becomes clear upon reading Salim's motion to strike defendants' affirmative defense of limitation of liability under 46 U.S.C. § 1304(5) ("§ 1304(5)") of the Carriage of Goods by Sea Act ("COGSA"). If § 1304(5) applies to the shipment, it would limit defendants' liability to $ 500 per customary freight unit ("cfu"). The Bill provided:

> "If this Bill of Lading is a document of title to which the Carriage of Goods by Sea Act [applies]... this Bill of Lading shall have effect subject to the provisions of said Act or other similar legislation, as the case may be, which shall be deemed incorporate herein and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities... if any term of this Bill of Lading is repugnant to the Said Act... such terms shall be void to that extent but no further."

Thus, defendants could argue that COGSA and § 1304(5)'s $ 500/cfu limitation applies if Salim sues under the Bill. In light of the likely diminution in recovery if the limit applies, Salim's efforts to avoid suing under the Bill become more comprehensible.

Our analysis of the present motion has two parts. First, we must determine whether each defendant has a right to compel Salim to arbitrate under the Bill. Second, for those parties who do have a right to compel arbitration, we must decide whether Salim can defeat that right on other grounds.

I. Basis of Right

Each defendant's right to compel Salim to arbitrate derives from the Bill's incorporation of the Contract. The Supreme Court has held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit." AT&T Tech., Inc. v. Communications Workers of America, 475 U.S. 643, 648, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986). [**10] Courts in this circuit have regularly held that "if a charter party's arbitration clause is expressly incorporated into a bill of lading, nonsignatories of the charter party who are linked to that bill through general principles of contract or agency law may be bound," provided they are put on actual or constructive notice of their arbitration obligation. Continental U.K., Ltd. v. Anagel Confidence Compania, 658 F. Supp. 809, 813 (S.D.N.Y. 1987); see Midland Tar Distillers v. M/T Lotos, 362 F. Supp. 1311 (S.D.N.Y. 1973); Lowry & Co. v. S.S. Nadir, 223 F. Supp. 871 (S.D.N.Y. 1963). In the instant case, we find that the Bill fully incorporated the entire Contract, including the arbitration clause. Indeed, the Bill singled-out notice of the arbitration clause, stating that "all terms whatsoever of the said Contract of Affeightment/Charter Party including the arbitration clause specified therein apply to and govern the rights of the parties concerned in this shipment" (emphasis added). See Thyssen v. M/V Markos, 1999 U.S. Dist. LEXIS 12578, 1999 AMC 2515, 2520-21, 1999 WL 619634 (S.D.N.Y. 1999); Amoco Overseas Co. v. S.T. Avenger, 387 F. Supp. 589, 593 (S.D.N.Y. 1975). [**11] In emphasizing the "parties [plural]

concerned in this shipment," the Bill shows the clear intent of all its parties to be bound by arbitration.

However, it is not enough that the parties to the Bill wished to be bound by the incorporated arbitration provision. Because the right to arbitrate under the Bill is incorporated, not independent, we must determine whether the parties' exercise of it violates the arbitration clause's terms. Courts undertaking this inquiry have "consistently drawn a distinction between an arbitration clause specifically identifying the parties to which it applies, and a broader form of arbitration clause which does not restrict the parties." In re Southwind Shipping Co., 1989 AMC 1088, 1092, 709 F. Supp. 79, 82 (S.D.N.Y. 1989). For a charterparty's arbitration clause to bind a party to a bill of lading who is not a charterparty signatory, the clause must not only be incorporated into the bill of lading, but also must contain "language... broad enough to allow nonsignatories' disputes to be brought within its terms." Lucky Metals Corp. v. M/V Ave, 1995 U.S. Dist. LEXIS 14215, 1996 AMC 265, 1995 WL 575195, at *2 (S.D.N. [**12] Y. 1995); see Son of Shipping Co. v. De Fosse & Tanghe, 1952 AMC 1931, 1932; 199 F.2d 687, 688 (2d Cir. 1952). Typically, "broad" arbitration clauses explicitly govern "all disputes" arising under the charterparty. See, e.g., Son Shipping Co., 199 F.2d 687 (2d Cir. 1952); Kaystone Chemical, Inc. v. Bow Sun, 1989 U.S. Dist. LEXIS 4384, 1989 AMC 2976 (S.D.N.Y. Apr. 19, 1989); [*199] Continental U.K. Ltd. v. Anagel Confidence Compania Naviera, S.A., 658 F. Supp. 809, 814 (S.D.N.Y. 1987), (quoting Production Steel Co. of Illinois v. S.S. Francois L.D., 294 F. Supp. 200, 201 (S.D.N.Y. 1968)); Midland Tar Distillers v. M/T Lotos, 362 F. Supp. 1311 (S.D.N.Y. 1973). In contrast, "a 'narrow' clause, which typically provides that disputes 'between owners and charterers' must be arbitrated; applies only to disputes between the particular parties identified in the clause." Thyssen v. M/V Markos, 1999 AMC at 2520-21 (citing, inter

alia, Import Export Steel Corp. v. Mississippi Valley Barge Line Co., 1966 AMC 237, 238; 351 F.2d 503, 505-06 (2d Cir. 1965); Sohtorik Shipping & Trading, Inc. v. Peter Cremer Befrachtungskontor, GMBH. & Co., 502 F. Supp. 143, 144-45 (S.D.N.Y. 1980); [**13] Production Steel Co. of Illinois v. S.S. Francois L.D., 294 F. Supp. 200, 201-02 (S.D.N.Y. 1968)). The issue of which defendants may compel arbitration, therefore, turns on whether the arbitration clause in the Contract is "narrow" or "broad."

The Contract's arbitration clause simply states: "Law General average and charterparty arbitration to be conducted in London." We have found no precedent involving an arbitration clause with precisely this language and it does not fall neatly into either of the two categories considered above -- it neither declares itself applicable to "any dispute" arising under the charterparty nor does it explicitly limit itself to the owner and charterer. However, by language (i.e., "charterparty arbitration") the clause is more akin to the "broad" language arbitration agreements than the "narrow." Furthermore, in light of the Federal Arbitration Act's ("FAA"), 9 U.S.C. § 1 et. seq., clear policy favoring arbitration agreements, the Supreme Court has instructed that any doubts concerning arbitrability "should be resolved in favor of arbitration, whether the problem at hand is the construction of statutory language itself [**14] or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). Taking into account this strong preference, where ambiguity exists the question is whether the language is "broad enough to allow nonsignatories' disputes to be brought within its terms," Lucky Metals, 1995 WL 575195, at *2, not whether the terms could be construed as narrow enough to exclude them. See also Midland Tar, 362 F. Supp. at 1314, n. 3 (S.D.N.Y. 1973) (construing ambiguous arbitration clause to be "broad" because, inter alia, federal law favors

arbitration). In the instant case, the arbitration clause simply says that "charterparty," i.e. Contract, disputes shall be arbitrated in London. Clearly, the clause's terms do not restrict its application to specific parties or problems. In the absence of any language elsewhere in the Contract indicating that this clause should not cover all disputes arising from it, we find that it is "broad" and may be exercised by nonsignatories, as incorporated into the Bill.

Finally, we must ascertain [**15] whether plaintiff and each of the defendants seeking to compel arbitration was a party to the Bill. Botany Bay clearly may exercise the arbitration clause as it was both a signatory to the Contract and the Bill. The Shropshire and Langton (Shropshire's owner) are parties to the Bill and its arbitration clause by evidence of the Master's signature on the Bill. See Thyssen v. M/V Markos, 1999 AMC at 2523; Instituto Cubano De Establizacion Del Azucar v. T/V Golden West, 246 F.2d 802 (2d Cir. 1952) ("When the master signed the bills of lading the vessel owner became liable in personam, and the [*200] vessel liable in rem, in the event there should be any failure in the performance of the contract of carriage the bills of lading evidenced"); Maize Bd. of the Republic of South Africa v. M/V Courageous I, 685 F. Supp. 420, 421 (S.D.N.Y. 1988). Lastly, Salim is bound as the holder in due course of the Bill, see Thyssen, 1999 AMC at 2523 (citing Son Shipping, 199 F.2d at 688 (inferring that the holder of a bill of lading consents to the terms of the charter when the bill incorporates the charter party by reference); [**16] Amoco Oil Co. v. M/T Mary Ellen, 529 F. Supp. 227, 229 (S.D.N.Y. 1981); Midland Tar, 362 F. Supp. 1311, 1314 (S.D.N.Y. 1973)), and consignee of the goods. See id. (citing Kaystone Chemical, Inc. v. Bow-Sun, 1989 U.S. Dist. LEXIS 4384, 1989 AMC 2976, 1989 WL 39498, at *4 (S.D.N.Y. 1989); Kanematsu Corp. v. MV GRETCHEN W, 1994 U.S. Dist. LEXIS 21566, Civ.No. 93-1437- ST., 1995 WL 774554, at *3 (D. Or. Sept. 27, 1994)). In sum, all of the

proper defendants have the right under the Bill to compel Salim to arbitrate its claims against them in London. n3

II. Plaintiff's Challenges

Salim raises several arguments to defeat certain defendants' arbitration rights. Many of these arguments mirror ones raised by Thyssen (plaintiff) in Thyssen v. M/V Markos, 1999 U.S. Dist. LEXIS 12578, 1999 AMC 2515, in which Thyssen was represented by Salim's current counsel. Where Judge Mukasey analyzed these arguments in depth and on facts materially identical to ours, we do not feel the need to recapitulate his well-reasoned analysis and will simply cite Thyssen.

Salim first argues that the Shropshire cannot exercise its arbitration right because English arbitrators have no jurisdiction over in rem claims and English law provides no similar maritime lien for cargo damage. However, Langton's letter of undertaking and later $ 600,000 bond moot this argument by replacing the vessel as the res. See Mackensworth v. S.S. AMERICAN MERCHANT, 28 F.3d 246, 252 (2d Cir. 1994); Alyeska Pipeline Serv. Co. v. The Vessel Bay Ridge, 703 F.2d 381, 384 (9th Cir. 1983), cert. dismissed, 467 U.S. 1247 (1984) ("A plaintiff's lien for the claims alleged against the vessel is transferred [**18] to the security posted."); J.K. Welding Co. v. Gotham Marine Corp., 47 F.2d 332, 334 (S.D.N.Y. 1931). The London arbitrator has jurisdiction over the bond and, accordingly, may arbitrate Salim's claims against the Shropshire.

Next, Salim contends that its claims against Bibby and Botany Management lie in tort, not in contract under the Bill, and thus are not subject to the Bill's arbitration clause. Specifically, plaintiff seeks to bring its claims against Bibby and Botany Management under negligence theories. In Thyssen, Judge Mukasey rejected plaintiff's attempt to avoid an arbitration clause in a bill of lading by casting the claim in

tort. Consistent with Second Circuit precedent, he found that the arbitrability of a claim does not turn on the legal theory under which it its pled, but on the claim's relationship to the subject matter of the arbitration clause. See Thyssen, 1999 AMC at 2524 (citing Collins & Aikman Prods. Co. v. Building Sys., Inc., 58 F.3d 16, 20 (2d Cir.)) ("If allegations of the complaint 'touch matters' covered by the arbitration agreement, those claims must [*201] be arbitrated, regardless of the legal labels [**19] attached to them."); In re Oil Spill by the Amoco Cadiz, 659 F.2d 789, 794 (7th Cir. 1981) ("Whether a particular claim is arbitrable depends not upon the characterization of the claim, but upon the relationship of the claim to the subject matter of the arbitration clause."). In the instant case, Salim's claims against Bibby and Botany Management plainly are for damage to the cargo during it shipment -- precisely the subject matter and purpose of the Bill and its arbitration clause. Salim cannot escape the Bill's arbitration clause simply by couching the claim in tort instead of contract, for "were the rule otherwise, a party could frustrate any agreement to arbitrate simply by the manner in which it framed its claims." In re Spill by the Amoco Cadiz, 659 F.2d at 794.

Finally, Salim argues that the Court's order on consent of February 24, 1998 constitutes "the law of the case" and, therefore, that defendant is precluded from re-litigating the issue at this time. Salim misapprehends the basic meaning of the "law of the case" doctrine. The law of the case is a discretionary doctrine and "posits that where a court decides upon a rule of law, that decision [**20] should continue to govern the same issues in subsequent stages in the same case." Arizona v. California, 460 U.S. 605, 618-19, 75 L. Ed. 2d 318, 103 S. Ct. 1382 (1983). This Court made no decision upon a rule of law. Defendant's motion to stay the complaint pending arbitration was never fully briefed and this Court never issued any decision on the merits. The February 24,

1998 order on consent embodied nothing more than this Court's approval and ordering of the parties' agreement. Moreover, were that order considered the law of the case, it would make no difference. It was this Court's understanding that the order anticipated Salim bringing its claims under the Contract's arbitration clause as incorporated into the Bill. Had we understood that the consent order was designed to allow Salim to proceed in London against Botany Bay under the Contract alone, we would never have signed it. Thus, even if this Court's order on consent were a decision of law, it would still be subject to the court's discretion and Salim would find no relief from arbitrating in London.

CONCLUSION

For the foregoing reasons, defendants' motion to compel arbitration in London is granted. [**21] The parties are hereby ordered to proceed to arbitration in London pursuant to the arbitration clause in the Contract, as incorporated into the Bill. The parties' cross-motions for summary judgment on the issue of limitation of liability are dismissed as the issue will be resolved by the London arbitrator.

Plaintiff counsel's request for sanctions against defendant's counsel is at a minimum surprising. Plaintiff's attempt to arbitrate in London only under the Contract, when Salim was not a party to the Contract, and subsequent refusal to amend its petition to proceed under the Bill alone (and thus to undermine the earlier consent to arbitrate), borders on abuse of the judicial process. Furthermore, in opposing defendants' motion to compel arbitration, plaintiffs' counsel has failed to cite key adverse, if not controlling, precedent in Thyssen v. M/V Markos, 1999 U.S. Dist. LEXIS 12578, 1999 AMC 2515, a case of which plaintiff's counsel is keenly aware having represented Thyssen in that action. In contrast, defendant's position is, in our view, correct and reasonable. Accordingly, plaintiff's motion for sanctions is denied.

IT IS SO ORDERED.

DATED: New York, New York

April 24, 2001

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Footnotes

n1 Unless otherwise indicated, all facts and allegations concerning this case are taken from the Parties' respective pleadings, Rule 56.1 Statements, affidavits and attached documents.

n2 In light of the number of parties and the similarity of many of their names, a brief description of each may aid the reader.

Salim Oleochemicals, Inc. ("Salim"): Salim is the plaintiff and is in the chemical business.

Salim Oleochemicals, Pte. ("Salim Pte"): Salim Pte is a foreign affiliate of Salim. It signed the Contract with Botany Bay that is incorporated into the bill of lading at the heart of this suit.

M/V Shropshire ("Shropshire" or "the Ship"): The Shropshire carried the glycerine that became contaminated. Salim sued it in its in rem capacity, although it was later released when Langton posted a letter of undertaking and a $ 600,000 bond for it.

Langton Shipping, Ltd. ("Langton"): Langton was the owner of the Shropshire. It posted the letter of undertaking and $ 600,000 bond to free the ship from its in rem arrest.

Botany Bay Tankers International ("Botany Bay"): Botany Bay was the shipper. It signed the Contract with Salim Pte and was a signatory to the bill of lading. Botany Bay was the only defendant named in Salim's first London arbitration action.

Botany Bay Management Services ("Botany Management"): Botany Management managed Botany Bay.

Bibby Int. Services ("Bibby"): Bibby was the Shropshire's manager.

n3 Bibby and Botany Management acted as disclosed agents and, accordingly, are not proper defendants in this action. See, Seguros Banvenez, S.A. v. S/S Oliver Drescher, 761 F.2d 855, 860 (2d Cir. 1985) ("When an agent makes a contract for a disclosed principal, it becomes neither a party to the contract nor liable for the performance of the contract. Restatement (2d) of Agency § § 320, 328. Accordingly, it is not liable if the contract is breached. Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 808 (2d Cir. 1971).").

No. 02-565

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IN THE

Supreme Court of the United States

SALIM OLEOCHEMICALS,

Petitioner,

v.

M/V SHROPSHIRE, her engines, boilers, tackle, etc., BIBBY INTERNATIONAL SERVICES (IOM) LTD., LANGTON SHIPPING LTD., BOTANY BAY PARCEL TANKERS INTERNATIONAL, BOTANY BAY MANAGEMENT SERVICES PTY LTD., and LANGTON SHIPPING,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

This case presents the question of whether a party to a bill of lading can avoid the obligations imposed by an arbitration clause incorporated into that bill of lading. Petitioner herein seeks to avoid arbitration by contending arbitration will lessen the obligations, of the carrier or the vessel, imposed by the United States Carriage of Goods By Sea Act, 46 U.S.C. App. §§ 1300-1315. This Honorable Court expressly rejected this argument in *Vimar Seguros y Reseguros v. M/V SKY REEFER*, 515 U.S. 528 (1995).

The petitioner also seeks to avoid arbitration by asserting claims against the agents of the shipowner and charterer, claiming that they were negligent. These agents are bound to and protected by the arbitration clause. The same facts and issues would determine the claims against these agents and their principals. The majority of the federal circuits have recognized that non-signatories can enforce arbitration clauses, as to do otherwise would thwart the federal policy favoring arbitration.

Accordingly, the second question to be addressed herein is whether a party to an arbitration clause can avoid arbitration by asserting tort claims against the agent of another party to the arbitration clause.

CORPORATE DISCLOSURE STATEMENT

None of the Respondents or any parent or subsidiary of the Respondents herein are publicly traded corporations in the United States of America or elsewhere. Respondents, Botany Bay Parcel Tankers International and Botany Bay Management Services Pty Ltd. are both members and subsidiaries of the Botany Bay Group Ltd. Respondent, Bibby International Services (IOM) Ltd. is a member and subsidiary of the Bibby Line Group Ltd. As these companies/ corporations are not publicly held, no publicly held company owns 10% or more of the stock of the company.

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STATEMENT OF THE CASE

Procedural History

Respondents adopt the Procedural History, regarding this matter, set forth in the Petition for Writ of Certiorari, with the following additions.

Subsequent to the commencement of this action, respondents moved to compel arbitration to which petitioner agreed. The action was stayed in favor of arbitration. In arbitration, petitioner attempted to claim solely under a contract of affreightment ("COA"), to which it was not a party and refused to proceed under the bill of lading. The shipper was a party to the COA, but petitioner was not. Petitioner was only a party to the bill of lading which incorporated the COA including its arbitration clause. Consequently, there was no agreement to arbitrate presented to the arbitrator. Respondents asked that the arbitration either proceed under the bill of lading or be dismissed. When petitioner refused to proceed under the bill of lading, the arbitrator found that he had no power to proceed in the absence of the bill of lading's arbitration agreement.

The stay in the action was lifted on August 18, 2000, and petitioner moved for summary judgment claiming, *inter alia*, entitlement to the protections of English law. Respondents counter-moved to compel arbitration under the bill of lading. The District Court ordered the parties to arbitrate, as required by the arbitration clause incorporated into the bill of lading. Petitioner has not commenced an arbitration proceeding, pursuant to the bill of lading. The District Court retained jurisdiction and can determine whether an arbitration award derogates from COGSA at award enforcement.

Statement Of The Facts

This appeal concerns the arbitration of a dispute arising from the transportation of cargo of glycerine from Belawan, Indonesia, to Newark, New Jersey. The cargo was shipped under the COA entered into by Salim Oleochemicals Pte. Ltd. ("Salim Pte.") and Botany Bay Parcel Tankers International ("Botany Bay Tankers"), charterer of the M/V SHROPSHIRE. The COA called for London arbitration. Salim Pte., a separate but related entity to petitioner herein, was the shipper of the cargo, which it sold to petitioner, Salim Oleochemicals Inc. ("SOI"). The bill of lading named petitioner as consignee and incorporated the terms of the COA, including the arbitration clause found therein. Petitioner claims the cargo carried under the bill of lading was damaged while on board the M/V SHROPSHIRE. Accordingly, petitioner's claims arise from the transportation of the cargo under a bill of lading, subject to London arbitration.

This action began when petitioner breached its contractual obligations by filing an action in the District Court, in contravention of its obligation to arbitrate. Thereafter, the parties entered into an Order on Consent to arbitrate. Petitioner commenced arbitration in London claiming only under the COA, to which it was not a party. Respondents objected to the arbitration proceeding solely under the COA and requested the petitioner to amend its claim and proceed under the bill of lading, to which petitioner was a party. Petitioner refused. The arbitrator dismissed the arbitration as he lacked jurisdiction without an agreement to which petitioner was a party. Consequently, petitioner aborted the arbitration proceeding by refusing to claim under the bill of lading.

The District Court retained jurisdiction "without prejudice to the right of [petitioner] to reopen it after the conclusion of the London arbitration proceedings if the final decision results in the reduction of the defendants' obligations in violation of COGSA." Petition for Writ of Certiorari, Appendix, p. 14a.

REASONS FOR DENYING THE PETITION

I. ARBITRATION WILL NOT DEPRIVE PETITIONER OF ANY RIGHT OR REMEDY

Petitioner clearly seeks the reversal of the decision in *Vimar Seguros y Reseguros v. The M/V SKY REEFER*, 515 U.S. 528, 115 S. Ct. 2322, 132 L. Ed. 2d 462 (1995), which held that foreign arbitration clauses do not derogate from the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. App. §§ 1300-1315. Petitioner claims that it will lose *in rem* rights if the dispute is decided by a London arbitrator. This Honorable Court in its decision in *Vimar Seguros y Reseguros v. M/V SKY REEFER, supra*, expressly addressed the same issues now raised by petitioner holding that foreign arbitration clauses do not lessen COGSA liability; that the Federal Arbitration Act ("FAA") requires enforcement of an arbitration agreement in a bill of lading; and that COGSA and the FAA do not conflict. Accordingly, this Honorable Court has already decided the issues raised by plaintiff. There is no question that plaintiff seeks to overturn the *SKY REEFER* decision.

Contrary to petitioner's implication, there is no dispute among the federal circuits regarding the enforceability of a foreign arbitration clause in a bill of lading. Only four decisions, by three federal Courts of Appeals, regarding this

issue have been reported since the decision in *M/V SKY REEFER*: two by the Court of Appeals for the Ninth Circuit, one by the Court of Appeals for the Fifth Circuit, and one by the Court of Appeals for the Second Circuit. These cases are: (1) *Kukje Hwajae Insurance Co., Ltd. v. the M/V HYUNDAI LIBERTY, et al.*, 294 F.3d 1171 (9th Cir. 2002); (2) *Fireman's Fund Ins. Co. v. the M/V DSR ATLANTIC*, 131 F.3d 1336 (9th Cir. 1997); (3) *Mitsui & Co. (USA), Inc. v. M/V MIRA, et al.*, 111 F.3d 33 (5th Cir. 1997); and (4) *Thyssen Inc. v. Calypso Shipping Corp. ("M/V MARKOS N")*, W.L. 31122383 (2d Cir. 2002). Of the above-mentioned decisions, only the Second Circuit's decision in the *M/V MARKOS N* addresses an arbitration clause in a bill of lading. Each of these decisions held: that the arbitration clause or forum selection clause did not contravene COGSA; and that the forum selection clauses and arbitration clause were presumptively valid. Review of these decisions will reveal no conflict among the federal circuits.

A. *English Law Allows for the Arrest of a Ship for Damage to Cargo*

Plaintiff's contentions regarding the power of English arbitrators seek to mislead this Honorable Court.

A claim for loss and damage to cargo falls within the admiralty jurisdiction of the High Court of England and Wales. English Supreme Court Act of 1981, Sec. 20(2)(g):

> The admiralty court has *in rem* jurisdiction in respect of such claims where "(a) the claim arises in connection with a ship and (b) the person who would be liable on the claim in an action *in personam* . . . was, when the cause of action

> arose, the owner or charterer of, or in possession or in control of, the ship" and an action *in rem* may be brought against the ship. English Supreme Court Act of 1981, Sec. 21(4).

If a claim for damage to cargo meets the above requirements, the claimant is entitled to have the vessel proceeded against *in rem* and arrested by the Court.

Once a vessel is arrested, security may be posted to obtain the vessel's release. Also, a security agreement can be entered to avoid the arrest of the vessel. If security is provided, the claimant's right to arrest the vessel is extinguished. *The Kalamazoo*, (1851) 18 LTOS 66. After security has been provided and if there is an arbitration agreement, the court proceedings will be stayed and the claim will be referred to arbitration. *English Arbitration Act of 1996*, Sec. 9(1) and (4). Thereafter, the merits of the claim will be decided in arbitration. If a claimant received an award in London arbitration, it looks to the security. In both England and the United States, arbitrators decide the merits of the claim.

B. *Petitioner's In Rem Rights Are Extinguished*

Prior to commencing this action, petitioner requested and was provided with a Letter of Undertaking ("LOU"), in consideration for not arresting the M/V SHROPSHIRE, whereby petitioner's *in rem* claim was secured and transferred to that LOU. The LOU became a substitute *res*, and petitioner was no longer entitled to arrest the vessel. *Mackensworth v. S/S AMERICAN MERCHANT*, 28 F.3d 246, 252 (2d Cir. 1994). An LOU allows the vessel owner to avoid the seizure of the vessel in exchange for the posting of security. *In re Topgallant Lines*, 154 B.R. 368, 377 (S.D.Ga. 1993).

Once a LOU is provided, the lien or *in rem* claim is transferred to the security. *Id.* "The posting of alternative security forever discharges the lien against the vessel." *Globe Barge, Inc. v. Johness Hunter, Inc.*, 1986 A.M.C. 1989, 1993 (E.D.La. 1986); *see also* Gilmore & Black, *The Law of Admiralty*, § 9-89 at pp. 798-800 (2d ed. 1975), *citing*, *The New England (J.K. Welding Co. v. Gotham Marine Co.)*, 47 F.2d 332, 335 (S.D.N.Y. 1931). Petitioner can no longer enforce any claims against the vessel but can only proceed against the security provided. The security remains with the District Court and is available to satisfy an arbitration award. The FAA allows for admiralty claimants, such as petitioner, to obtain security, while preserving the right of all parties to arbitrate. 9 U.S.C. § 8. After arbitration, the District Court can determine whether COGSA has been derogated from in the arbitration. *See SKY REEFER*, 515 U.S. at 538. If the respondents' obligations in arbitration are less than required by COGSA, the District Court can refuse to confirm the award

Petitioner falsely claims that it will receive less under English law. A comparison between United States and English law reveals significant similarities. In both jurisdictions:

(1) A cargo claimant can bring an action to arrest a vessel, *Demsey & Associates, Inc. v . S.S. SEA STAR*, 461 F.2d 1009, 1014 (2d Cir. 1972) ("Every claim for cargo damage creates a maritime lien against the ship which may be enforced by a libel *in rem*."); English Supreme Court Act of 1981 § 20(2)g and § 21(4); William Tetley, *Maritime Liens and Claims*, p. 729 (2d Ed. 1998) (The cargo claimant in the U.K. has a statutory right *in rem* against the carrying vessel);[1]

1. The difference between a maritime lien in the United States and a statutory right *in rem* in the United Kingdom is not significant at this time as security has been posted.

(2) Once a vessel is arrested it can be released by the posting of security. Fed. R. Civ. P., Admiralty, Maritime Claims, Supp. Rule E(5); *The Kalamazoo*, (1851) 18 LTOS 66;

(3) After security is obtained, claims subject to arbitration are referred to arbitration, and the security is retained to satisfy an award given in arbitration. 9 U.S.C. § 8; *THE ANACONDA v. American Sugar Refining Co.*, 322 U.S. 42, 45 (1944); English Arbitration Act of 1996 § 11.

Under the laws of either jurisdiction, arbitrators cannot order the arrest of a ship, only a Court can do so. However, after an arrest or posting of security, arbitrators can decide the merits of the claim.

The real reason for this appeal is that petitioner is time barred from London arbitration, due to petitioner's own conduct aborting the first arbitration. This appeal only exists due to petitioner's dilatory conduct.

II. ALL OF PETITIONER'S CLAIMS MUST PROCEED TO ARBITRATION

The District Court ruled the arbitration agreement herein was broad and could be exercised by nonsignatories. All of the claims alleged against the respondents can be arbitrated. The acts of agents are arbitrable, if the acts, which a plaintiff alleges provides the basis or its cause of action, fall within the scope of the arbitration agreement. *Mosca v. Doctors Associates, Inc.*, 852 F. Supp. 152 (E.D.N.Y. 1993). Accordingly, the claims against the managers must also be arbitrated, contrary to petitioner's contentions.

Nonsignatories to arbitration agreements can become bound thereto without becoming a signatory. *Fisser v. International Bank*, 282 F.2d 231, 233 (2d Cir. 1960). Ordinary principles of contract and agency determine who is bound by arbitration agreements. *Id.*; *see also Aviall, Inc. v. Ryder System, Inc.*, 913 F. Supp. 826, 830, *citing First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 939 (1995). The relevant determination is whether the alleged acts of the managers, on which SOI bases its tort claim, occurred both within and as a result of their agency and within the scope of the arbitration agreement. *Id.*

The federal circuit courts are not in disagreement regarding this issue. The majority of the federal circuits have held that nonsignatories can be bound to arbitration agreements. *Choctaw Generation Ltd. v. American Home Assurance Co.*, 271 F.3d 403 (2d Cir. 2001); *see also Smith/ Enron Cogeneration Limited Partnership v. Smith Cogeneration International*, 198 F.3d 88 (2d Cir. 1999); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1121 (3d Cir. 1993); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281-82 (6th Cir. 1990); *Letizia v. Prudential Bache Securities*, 802 F.2d 1185, 1187-88 (9th Cir. 1996); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988); *McBro Planning and Dev. Co. v. Triangle Elec. Constr. Corp.*, 741 F.2d 342 (11th Cir. 1984); *Sam Reisfeld & Son Import Company v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976).

Petitioner alleges its claim arose from the managers "acts or omission in managing the vessel and crew." If the managers owed any duty from which a negligence cause of action could arise, that duty arose from the tasks delegated to these agents by their respective principals, the shipowner and charterer.

The same factual issues would determine petitioner's COGSA claims against the principals, which are subject to arbitration. Both managers in question were disclosed agents of their principals. The question is whether a disclosed agent of a principal can benefit from the terms and conditions of the arbitration agreement including the mandatory arbitration clause?

Petitioner cites cases that establish that it might have a claim against the agents of owners of vessels and managers of vessels. However, it fails to cite any case that deprives an agent of the benefits of an arbitration agreement.

In *Asoma v. Kubbar*, 1998 A.M.C. 100 (S.D.Tx. 1997), there is no reference or discussion of arbitration.

Tradearbed, Inc. v. M/V AGIA SOPHIA, 1997 A.M.C. 2838 (D.N.J. 1997), does not discuss arbitration. Instead, the Court dismissed a claim for unseaworthiness against all defendants, including owners, operators, charterers, and managers of a vessel to enforce a forum selection clause.

Joo Seng Hong Kong v. The S.S. UNIBULKFIR, 483 F. Supp. 43 (S.D.N.Y. 1979), a case decided before *Vimar v. SKY REEFER, supra*, held a plaintiff could not sue under a contract for the sale of goods which has an arbitration clause but could sue for the loss or damage to cargo during ocean transportation, under a bill of lading that had no arbitration clause.

The petitioner's claims against the managers are subject to arbitration. If the *in rem* claims or the claims against the managers were forced to trial, "the arbitration proceedings would be rendered meaningless and the federal policy in favor

of arbitration effectively thwarted." *Sam Reisfeld & Son Import Company v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976). Accordingly, all claims herein must proceed to arbitration. Once again, the real reason for this appeal is that petitioner's claims are time barred from arbitration.

CONCLUSION

The respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari for the foregoing reasons.

Respectfully submitted,

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